IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1401

SECURITY STORAGE COMPANY OF WASHINGTON, a Corporation, *et al.*,
Petitioners,

v.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

GILBERT HAHN, JR., ESQ.
11th Floor
1150 Conn. Ave., N.W.
Washington, D.C. 20036
Attorney for Petitioners

MARY KATHLEEN HITE
WOLF, BLOCK, SCHORR AND SOLIS-COHEN
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

I N D E X

TABLE OF CITATIONS

Constitutional and Statutory Provisions:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO._____

SECURITY STORAGE COMPANY OF WASHINGTON,
a Corporation, et al.,

Petitioners

v.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Security Storage Company of Washington, et al., Petitioners, appellees below, respectfully pray that a writ of certiorari

issue to review the judgment of the District of Columbia Court of Appeals entered on October 21, 1976, in District Unemployment Compensation Board v. Security Storage Company of Washington, et al., No. 10114.

OPINIONS BELOW

The Opinion of the Court of Appeals in the instant case is reported at 365 A.2d 785 (1976) and is reprinted in the Appendix, infra, p.1a.

The Order of the Superior Court of the District of Columbia, Civil Division, in the instant case, is unreported and is reprinted in the Appendix, infra, p. 12a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was initially entered on October 21, 1976. Petitioners' Petition for Rehearing or Hearing En Banc or Alternatively to Clarify the Court's Order was timely filed on December 10, 1976, and was denied by the Court of Appeals on January 11, 1977 (Appendix p. 31a). On January 28, 1977, the District of Columbia Court of Appeals granted a stay of mandate for the period of time permitted by law for the filing of a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the District of Columbia Court of Appeals deny Petitioners their due process right to a hearing on an alleged deprivation of property without due process of law, where the Court of Appeals on an appeal from a preliminary injunction, reversed this case on the merits without considering Petitioners'

unadjudicated due process allegations?

2. Did the failure of District Unemployment Compensation Board to comply with the District of Columbia Administrative Procedure Act cause the tax increase levied by the District Unemployment Compensation Board to take property rights without due process of law as to 1974 and 1975, even if the District of Columbia Court of Appeals agreed that the District Unemployment Compensation Board had made a "rule" consistent with the statute?

CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the United States Constitution provides in part:

> . . .nor [shall any persons] be deprived of. . .property, without due process of law...

STATEMENT OF THE CASE

On or about August 1, 1974, District Unemployment Compensation Board (herein-

after DUCB) increased employer taxes (contribution rates) for the third and fourth quarters of 1974. On or about August 1, 1975, DUCB again increased employers' taxes (contribution rates) for the third and fourth quarters of 1975.

Petitioners maintain that DUCB's increase of employer taxes for the third and fourth quarters of 1974 and 1975 was invalid rulemaking under D.C. Code §1-1501, the District of Columbia Administrative Procedure Act (hereinafter D.C. APA). Petitioners maintain that DUCB did not comply with the rulemaking requirements of D.C. APA. These issues, which were central to Petitioners' case, were never heard or tried in the trial court and were ignored by the District of Columbia Court of Appeals.

Following DUCB's action in August, 1975, two employers, Petitioners here,

filed a complaint for injunctive relief and declaratory judgment as to the invalidity of the increase for the third and fourth quarters of 1975. The complaint was subsequently amended to add two additional employer plaintiffs and then further amended to seek refunds of the 1974 increases in addition to enjoining the 1975 increases. The employer plaintiffs, suing on behalf of themselves and others simiarly situated,[1/] prior to DUCB's actions, had contribution tax rates lower than the standard rate (Appendix pp. 17a to 19a).

Petitioners alleged in the original and amended complaints that DUCB's actions increasing employment tax rates in the

1/ Plaintiffs motion for class action certification was denied orally on September 30, 1975.

third and fourth quarters of 1974 and 1975 were authorized by the statute (Chapter 3 of Title 46 of the D.C. Code), that any increase under D.C. Code §46-303(c)(4)(B) could only take effect in the following calendar year, and that DUCB's action was not in compliance with the D.C. APA, D.C. Code §1-1501 et seq..

Petitioners alleged that DUCB had issued a rule interpreting D.C. Code §46-303(c)(4)(B) and made determinations as to the amount and status of the fund on certain dates without compiling, indexing and publishing the rules in violation of D.C. Code §1-1507; without publishing 30 days' notice of the proposed rulemaking in violation of D.C. Code §1-1505; and without publishing the rules in violation of D.C. Code §1-1506.

Petitioners maintain that DUCB did not comply with these requirements of the D.C.

APA. Petitioners alleged that DUCB's invalid rulemaking illegally, wrongfully and unconstitutionally raised Petitioners' contribution rates for the third and fourth quarters of 1974 and 1975. Petitioners alleged that the increases were in violation of the statute, a violation of the equal protection of the law and the taking of property without due process of law. (Second Amended Complaint, ¶¶13-17,23,44, 45,51)

The unemployment compensation program for the District of Columbia is established in Chapter 3 of Title 46 of the District of Columbia Code. Employers subject to the requirements of the statute contribute to the unemployment compensation fund (D.C. Code §46-302) under formulas set forth in the statute. D.C. Code §46-303(c) established employers' tax contribution rates based on benefit experience and reserves.

D.C. Code §46-303(c)(8)(D) permits employers to make voluntary additional contributions to their separate accounts in the fund to secure the benefits of tax rates lower than the standard rate. D.C. Code §46-303(c)(4)(B) authorizes DUCB to increase the contribution tax rates for employers under certain conditions.

On September 30, 1975, a preliminary injunction order was entered (Appendix p. 12a to 30a) enjoining DUCB from implementing the increase for the third and fourth quarters of 1975. The preliminary injunction was based on the interpretation of the unemployment compensation statute (Appendix pp. 26a to 28a) and did not involve petitioners' allegations of D.C. APA violations.

DUCB appealed the granting of the preliminary injunction and first sought summary

reversal which was denied. The briefs and other papers filed in the Court of Appeals dealt only with the issue of statutory interpretation as set forth in the preliminary injunction order. On October 21, 1976, the Court of Appeals issued its opinion holding that DUCB's interpretation of the unemployment compensation statute was correct. The Court's opinion included the following language:

> We note at the outset that although there has been no final adjudication in the trial court on the merits of appellees' complaint, which accompanied their motion for preliminary injunction, we deem it appropriate to reach the merits in light of the fact that the case turns entirely on a question of statutory interpretation. (Appendix p.2a)

The Court then held in favor of DUCB's interpretation and reversed.

Petitioners filed a Petition for Rehearing or Hearing En Banc or alternatively to clarify the Court's Order. In addi-

tion to urging that the Court reconsider its ruling on the interpretation of the unemployment compensation statute, Petitioners requested that the Court clarify its opinion and order to permit Petitioners to proceed to trial on the remaining allegations in the complaint. Petitioners specifically stated to the Court of Appeals that even if DUCB's interpretation of the statute was correct, as found by the Court of Appeals, DUCB's action of interpreting the statute was subject to the rulemaking requirements of the D.C. APA. Petitioners argued that the "rule" announced by DUCB was inconsistent with the statute. Petitioners argued that, even if the "rule" was consistent with the statute that DUCB had failed to follow the provisions of D.C. APA. The Petition was denied by the Court in all respects. (Appendix p.31a)

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals denied Petitioners their right under the due process clause of the fifth amendment to a hearing on Petitioners' claim that they were deprived of their property without due process.

The District of Columbia Court of Appeals has deprived Petitioners of their opportunity to be heard on allegations of substantial violations of constitutional rights. Petitioners' allegations of D.C. APA violations (rulemaking by the Respondent DUCB wherein Respondent failed to comply with D.C. APA) have been afforded no hearing to date either by the trial court or the Court of Appeals.

The "rule" used by DUCB to increase Petitioners' taxes for 1974 and 1975 nowhere appears in D.C. Code §46-303(c)(4)(B). Even though the District of Columbia Court of Appeals agreed that DUCB's rule

was in "harmony with the statute", Dixon v. U.S., 381 U.S. 68,74 (1965), see also Manhattan General E. Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936), the Petitioners argue that DUCB failed to make a rule in compliance with D.C. APA. Consequently, while the District of Columbia Court of Appeals' opinion, if not overturned, could apply in future years, it could not apply retroactively to those years for which DUCB failed to comply with D.C. APA. Dixon, supra, at p. 74.

The issues presented to the Court of Appeals by DUCB were limited to the separate issue of proper statutory construction. By purporting to deal with the case on the merits (Appendix p.2a), the Court of Appeals ignored the remaining allegations in the complaint even after the

procedural history of the litigation and the remaining issues to be tried were called to the attention of the Court of Appeals in the Petition for Rehearing or Hearing En Banc or alternatively to clarify the Court's Order.

Procedural fairness and due process require that Petitioners be allowed the opportunity to prove their allegations, particularly where, as in this case, violation of substantial federal rights have been alleged.

This Court has held that it is error to dismiss a habeas corpus petition without affording the petitioner an opportunity to be heard where the petitioner has alleged denial of a constitutional right. Reynolds v. Cochran, 365 U.S. 526 (1961). The Court's language in Reynolds clearly indicates that a hearing is always necessary where a serious, substantial constitu-

tional claim has been made. As the Court stated:

> . . .we think it clear that this case must be reversed for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to another constitutional claim. . . 365 U.S. at 533.

The denial of a hearing in Reynolds has been characterized as an "arbitrary denial of due process". United States ex rel. Worlow v. Pate, 437 F.2d 909,911 (7th Cir., 1971). In Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir., 1964), the Court cited Reynolds as precedent for the rule that:

> The right of a litigant to be heard is one of the fundamental rights of due process of law. At 901.

The cases recognize the principle stated in Reynolds, supra, that a litigant with a constitutional claim has a right to be heard. The Court's reasoning

in Goldberg v. Kelly, 397 U.S. 254 (1970), applies here, even though that case concerned the right to an administrative hearing. In Goldberg, the welfare recipients had not yet shown that they were eligible for benefits, but the Court held that they had a due process right to a hearing to prove their eligibility.

Petitioners in this case have alleged that they have been deprived of property without due process and Petitioners have a right to be heard on those allegations.

The Court of Appeals deprived Petitioners of this right to a hearing when it reversed this case on the merits before Petitioners had an opportunity to be heard on their allegations of invalid rulemaking in violation of due process.

B. Petitioners' allegations that they were deprived of their property right to lower unemployment compensation tax rates

by unauthorized administrative action are substantial and constitutionally significant.

1. Petitioners' statutory entitlement is a property interest protected by the due process clause of the fifth amendment.

Petitioners have a statutory entitlement to a lower unemployment compensation contribution tax rate, and this statutory entitlement is a property interest protected by the due process clause of the fifth amendment.

Petitioners are employers entitled to reduced unemployment compensation contribution tax rates, as provided in D.C. Code §46-303(c)(8). (Appendix 17a to 19a) That statute, in effect, results in lower tax contribution rates for employers who maintain the proper reserves in the fund or who make voluntary additional contributions.

An employer who meets the statutory requirements is entitled to the statutory benefit of a lower contribution tax rate.

The decisions of this Court establish that an individual's legitimate claim of an entitlement to a state benefit constitutes a property interest protected by the due process clauses of the fifth and fourteenth amendments. Goldberg v. Kelly, supra. This Court has held that a property interest exists where a state, by statute or practice, has created an entitlement to an education, Goss v. Lopez, 419 U.S. 565 (1975); a driver's license, Bell v. Burson, 402 U.S. 535 (1971); and to government employment, Perry v. Sindermann, 408 U.S. 593 (1972).

In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), this Court stated:

> Property interests. . .are

> created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law. . .408 U.S. at 578.

In this case, Petitioners' entitlement to lower contribution tax rates was clearly created by the District of Columbia's statute. Thus, Petitioners have a property interest in the lower contribution rates and may not be deprived of that interest without due process of law.

2. Petitioners alleged that they were deprived of their property interests in lower unemployment compensation tax contribution rates by unauthorized administrative action without due process of law.

Petitioners alleged that the DUCB failed to comply with the strict rulemaking requirements of the D.C. APA. D.C. Code §1-1501 et seq. Petitioners further alleged that this illegal administrative

action is a deprivation of property in violation of the due process clause of the fifth amendment.

The ruling by the District of Columbia Court of Appeals agreeing with DUCB's interpretation of the statute does not dispose of Petitioners' claim that DUCB's interpretation was invalid rulemaking and therefore void for the years in question. Petitioners have a right to pursue their allegations and seek relief for the period when DUCB acted in violation of the D.C. APA. The fact that the District of Columbia Court of Appeals ultimately agreed with DUCB's interpretation did not and could not resolve the remaining allegations in the complaint. The applicability of the D.C. APA to DUCB's actions and the relief to which Petitioners may be entitled for allegedly invalid rulemaking are issues which remain open.

There is precedent both in this Court and in the District of Columbia for the principle that an administrative rule is invalid if it is not made in conformance with administrative procedures. See Morton v. Ruiz, 415 U.S. 199 (1974).

The District of Columbia Court of Appeals has twice in recent years enjoined agencies from enforcing rules which were issued without prior notice by publication. District of Columbia v. Green, 310 A.2d 848 (D.C.App., 1973), Junghans v. Department of Human Resources, 289 A. 2d 17 (D.C.App., 1971). The allegations, if proven, would entitle Petitioners to a similar remedy, as well as refunds of taxes illegally extracted pursuant to DUCB's invalid rulemaking.

The termination of a statutory entitlement by invalid rulemaking is a deprivation of due process. A state instru-

mentality cannot, consistent with the due process clause, act beyond the scope of its authority in seizing a person's property. See Great Northern Railway Co. v. Minnesota ex rel. Railroad and Warehouse Commission, 238 U.S. 340 (1914). The purpose of administrative procedure acts is to protect against due process violations which are likely to flow from "the inherently arbitrary nature of unpublished ad hoc determinations". Morton v. Ruiz, supra, at 415 U.S. 233.

Petitioners have made allegations with a substantial precedential and constitutional basis and have a due process right to a judicial hearing on these allegations

CONCLUSION

In the absence of review by this Court, the District of Columbia Court of

Appeals will have successfully deprived Petitioners of a hearing on allegations of deprivation of property without due process of law.

Petitioners respectfully urge that the writ of certiorari issue.

Respectfully submitted,

Gilbert Hahn, Jr., Esq.
Wolf, Block, Schorr and Solis-Cohen
11th Floor
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorneys for Petitioners

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10114

DISTRICT UNEMPLOYMENT COMPENSATION BOARD,
APPELLANT,

v.

SECURITY STORAGE COMPANY OF WASHINGTON,
A Corporation, *et al.*, APPELLEES.

Appeal from the Superior Court of the
District of Columbia

(Argued May 18, 1976 Decided October 21, 1976)

Bill L. Smith, with whom *George A. Ross*, *John L. Davis* and *Robert J. Hallock* were on the brief, for appellant.

Gilbert Hahn, Jr., for appellees.

Before KERN, GALLAGHER and NEBEKER, *Associate Judges*.

KERN, *Associate Judge*: The District Unemployment Compensation Board (Board) appeals from the trial court's order which preliminarily enjoined the Board from increasing, as of June 30, 1975, the rate of contribution for unemployment compensation by the appellee-employers during each of the third and fourth quarters of calendar year 1975. The trial court ruled that under the terms

of D.C. Code 1973, § 46-303(c)(4)(B), the Board could not require appellees to make an *immediate* increase in their contribution rate but rather they might defer such increase until the beginning of the calendar year 1976. The Board contends that the trial court's order was improper because it was based on an incorrect reading of the statute.

The decision to grant a preliminary injunction is within the sound discretion of the trial court,[1] and appellate review of that decision is ordinarily limited "to the issues of whether the trial judge abused his discretion in granting the injunction, or rested his analysis upon an erroneous premise." *A Quaker Action Group v. Hickel*, 137 U.S.App.D.C. 176, 180, 421 F.2d 1111, 1115 (1969). We note at the outset that although there has been no final adjudication in the trial court on the merits of appellees' complaint, which accompanied their motion for preliminary injunction, we deem it appropriate to reach the merits in light of the fact that this case turns entirely on a question of statutory interpretation. As the court in *Delaware & Hudson Railway Co. v. United*

[1] This court has recently enunciated the standard which should guide the trial judge in exercising his discretion as to the propriety of granting a preliminary injunction:

> A proper exercise of discretion requires the trial court to consider whether the moving party has clearly demonstrated: (1) that there is a substantial likelihood he will prevail on the merits; (2) that he is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to him from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order. [*Wieck v. Sterenbuch*, D.C.App., 350 A.2d 384, 387 (1976).]

Transportation Union, 146 U.S.App.D.C. 142, 159, 450 F.2d 603, 620 (1971) observed:

> Insofar as the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court. The matter stands in a different posture from that involved when there is no question or disagreement as to the legal principle involved, and the element of probability of success on the merits depends on a forecast as to the shape of the facts likely to emerge at trial. *If the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound.* [Emphasis added.][2]

We further note that while the order issued by the trial court in this case contained the recital that the employers "*will likely* prevail on the merits of their complaint," (emphasis added) a further reading of that order reveals that the trial court has already determined the merits with respect to a crucial element of the appellee-employers' claim, *viz.*, the proper construction of D.C. Code 1973, § 46-303(c)(4)(B).[3] Accordingly, the

[2] These principles were applied in *Perry v. Perry*, 88 U.S. App.D.C. 337, 338-39, 190 F.2d 601, 602-03 (1951), where the court reversed a denial of a preliminary injunction based on its disagreement with the trial court's construction of a written agreement.

[3] In its Conclusions of Law, the trial court said:

> D.C.Code § 46-303(c)(4)(B) authorizes the Defendant, under certain circumstances, to increase the contribution rate for each plaintiff based upon those certain

interests of judicial economy and efficiency would best be served by our full consideration of the merits of the employers' claim pursuant to the proper construction of Section 46-303(c)(4)(B).

The District of Columbia's Unemployment Compensation Act, D.C. Code 1973, § 46-301, creates an incentive, in the form of permitting contribution rates significantly lower than the standard rate of 2.7%,[4] for individual employers to maintain a stable work force and to make voluntary contributions to their separate accounts in the District Unemployment Trust Fund. These lower contribution rates enjoyed by the individual employers who operate in this fashion are not, however, permanently fixed; the Act contains several "emergency" measures by which the contribution rates of these employers will be increased in the event that the amount of the fund decreases to a certain point. The first of these measures provides in pertinent part:

---

conditions which may exist as of June 30, 1975, the "computation date". However, such increase in the rate of contribution must take effect and be applied in the ensuing calendar year, in this case, calendar year 1976. The Court concludes that D.C. Code § 46-303(c)(4)(B), § 46-301(8)(c)(i) [*sic*, § 46-301(i)] and DUCB Regulation No. 205.7 require this result.

The defendant had asserted that it had the right to increase the rate of contribution based upon the June 30, 1975 ("computation date") conditions for the third and fourth quarters of 1975, and proposed to increase rates of contribution to the plaintiffs. The court concludes that this construction is erroneous, based upon D.C. Code §46-303(c)(4)(B), § 46-301(8)(c)(i) [*sic*, § 46-301(i)] and DUCB Regulation No. 205.7.

[4] The "standard rate" of contribution, currently set at 2.7%, is governed by D.C. Code 1973, § 46-303(c)(3).

> If the amount of the fund *as of June 30* of any year is less than 4 per centum of the total payrolls subject to contributions under this chapter *for the twelve-consecutive-month period ending on the preceding December 1*, the contribution rate for each employer . . . shall be increased by the percentage differential between said 4 per centum of such total payrolls and said fund's percentage of such total payrolls. . . .[5] [D.C. Code 1973, § 46-303(c)(4)(B); emphasis added.]

The Board reads this provision to mandate an immediate increase in contribution rates so as to make them effective during the third and fourth quarters of any year in which the fund—as of June 30 of that year—has fallen below 4 per cent of the payrolls for the base period, *viz.*, the prior 12-month period ending December 1st. On the other hand, the appellee-employers contend, and the trial court agreed, that § 46-303(c)(4)(B) constrains the Board from increasing contribution rates until the beginning of the calendar year immediately after the year in which the Board's evaluation of the fund on June 30th takes place.

The trial court's order justified this reading of the statute on two bases: first, by the absence of express authorization in Section 46-303(c)(4)(B) for the Board to increase immediately as of June 30th the rate of contribution, and, second, by reference to the definition of "computation date" contained in Section 46-301(i) of the Act. That section provides in part:

---

[5] But in no event shall the contribution rate for any employer be greater than the standard rate.

> The term "computation date" means the 30th day of June of each year as of which rates of contributions are determined for the *next following calendar year*. . . . [Emphasis added.]

The trial court apparently reasoned that whenever the Board used June 30th as a "measuring" date, then this particular definitional provision necessarily limited the increases in employers' contribution rates to take effect in the calendar year *next following* the year in which the Board determined the balance of the fund to be inadequate. Put another way, the court seemed to view the term "June 30" as synonymous with the term "computation date" and hence Section 301(i) to apply to Section 303(c)(4)(B).

We are of opinion that the statutory provision in question here should be read in light of (a) the overall purpose of the Unemployment Compensation Act and (b) the relationship of Section 46-303(c)(4)(B) to the other "emergency" provision, *viz.*, § 46-303(c)(4)(C).[6] This second emergency measure provides in pertinent part:

---

[6] The appellee-employers have argued that, in the absence of judicial gloss of interpretation on § 46-303(c)(4)(B), we should look to similar statutes in other jurisdictions and to the interpretation of those statutes by other courts. However, they fail to cite any state statutes, and we have found none, that are sufficiently similar to the section in our Code here in question to be of relevance. VA. CODE ANN. § 60.1-85 (1975 Supp.), cited to the trial court by the appellee-employers (R.124), is irrelevant to our inquiry because, unlike § 46-303(c)(4)(B), it expressly provides that increases in contribution rates will become effective "the calendar year following such first day of July." Obviously, the Virginia statute presents no problems of statutory construction in light of this explicit command that the adjustment take place the "following" calendar year.

> If *on December 20 of any year*, the amount in the fund becomes less than 2 per centum of the total annual payrolls subject to contributions under the chapter *for the twelve-consecutive-month period ending on the preceding June 30*, the Board shall make a declaration to that effect. *Effective the quarter following such announcement*, each employer's . . . rate of contribution shall be the standard rate. [D.C. Code 1973, § 46-303(c)(4)(C); emphasis supplied.]

Thus, this statutory section *expressly* provides that the increased contribution rate will become effective within a matter of days, as might be expected of a measure designed "[t]o protect the solvency of the fund." *See* H.R. REP. No. 232, 78th Cong., 1st Sess. 2 (1943). In our view, Section 46-303(c)(4)(B), the provision here at issue, was also enacted "[t]o protect the solvency of the fund," and if it is to fulfill that legislative purpose it must be allowed to take effect as soon as possible after the Board's determination of the balance in the fund. Certainly there is nothing in the statute itself or in the legislative history which would require delaying its operation for six months in the face of an insolvent fund until the beginning of the next calendar year.[7]

---

[7] In fact, if anything, the legislative history supports an interpretation of § 46-303(c)(4)(B) which would require immediate increases in rates of contribution rather than delaying those increases until the next calendar year. While the legislative history notes that increases under the companion provision, § 46-303(c)(4)(C) will take effect in "the succeeding calendar year," there is no similar reference in the discussion of § 46-303(c)(4)(B). Rather, the House of Representatives Report simply states that under § 46-303(c)(4)(B), "the contribution for each employer will be increased. . . ." H.R.REP. No. 232, 78th Cong., 1st Sess. 2 (1943).

If the interpretation by the appellee-employers were to be adopted,[8] then the statute would be deprived of much of its utility as an emergency provision. Specifically, under § 46-303(c)(4)(B) the balance in the fund is measured on June 30th against the total payroll for the 12 months ending the prior December 1st. If, following this June 30th determination, the increase of the rate of contribution by an employer cannot take effect until the beginning of the next calendar year, there would be a hiatus of more than a year between the measuring period (the 12 months ending the *previous* December 1st) and the date of the rate increase (January through March of the *next* calendar year). We decline to attribute to Congress the intent to enact an emergency provision for increasing the fund yet to employ figures of measurement which are over a year old to redress a decreased balance in that fund. Nor do we think it reasonable that Congress would create two different emergency provisions to respond to deficiencies in the fund at two separate points in time and then dictate that *both* these provisions would take effect at the same time, *viz.*, the beginning of the next calendar year.

A reasonable reading of these two emergency statutory provisions is that they are to operate as progressive remedies which allow the level of the fund to be built up gradually when it becomes intolerably low. At the midpoint of any year, June 30, the fund is measured against the payrolls for the year ending the prior December 1st; if the fund is less than 4 per cent of the total payrolls, then the contribution rate for individual employers is

---

[8] The Board's Regulation § 205.7 does not support the particular construction appellees urge we give the statute since that Regulation employs the term "computation date" which is absent from Section 46-303(c)(4)(B).

at that time increased in varying degrees, depending on the amount of the deficiency. Such a gradual and flexible increase in rates is clearly designed to alleviate *short-term* deficiencies in the fund without completely eradicating the system of employer incentive based on lower contribution rates. If, however, at approximately the conclusion of the year, *viz.*, December 20, the fund continues to be deficient and stands at less than 2 per cent of the total payrolls for the year ending June 30, then a more drastic remedy is needed and prescribed. After a declaration by the Board of such a deficiency, the system of lower contribution rates is scrapped and each employer's contribution rate for the very next quarter returns to the "standard rate" of 2.7%.

We are not persuaded, as was the trial court, that Section 46-301(i), which defines the term "computation date", compels a reading of Section 46-303(c)(4)(B) contrary to that urged by the Board. Preliminarily, we observe that the very term "computation date" is *not* contained in § 46-303(c)(4)(B); rather, the term "June 30" is employed in that statute. Indeed, an earlier version of § 46-303(c)(4)(B), which Congress amended, did contain the phrase "computation date" instead of an express date, such as June 30th. In 1971, Congress amended the section to its present form, Act of Dec. 22, 1971, Pub. L. 92-211, § 2 (17), 85 Stat. 760-762, and we may properly infer from this amendment the legislative intent that § 46-303(c)(4)(B) be read without reference to the definitional provisions of § 46-301(i).

Furthermore, we believe our reading of § 46-303(c)(4)(B) to be consistent with established principles of statutory construction of taxing statutes; *viz.*, permitting employers to make lower contribution rates constitutes an exemption from the standard contribution rate, and,

like any tax exemption, the privilege of paying lower rates must be strictly construed against the tax-paying employer and in favor of the taxing authority.[*] The matter was succinctly phrased by the federal circuit court here in *National Rifle Association v. Young*, 77 U.S.App. D.C. 290, 291, 134 F.2d 524, 525 (1943):

> Compulsory unemployment contributions are taxes. Exemptions from taxation in general, and from this sort of taxation in particular, are strictly construed.

The rule of strict construction was expressed even more strongly by the court in *Washington Chapter of American Institute of Banking v. District of Columbia*, 92 U.S. App.D.C. 139, 141, 203 F.2d 68, 70 (1953), quoting 2 COOLEY, THE LAW OF TAXATION § 672 at 1403:

> An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used. . . .

---

[*] The appellee-employers have cited us to authority from another jurisdiction to the effect that taxing statutes are strictly construed against the state. *See Texas v. The Praetorians*, 143 Tex. 565, 186 S.W.2d 973 (1945). However, the rule in this jurisdiction is to the contrary. *See Conference of Major Religious Superiors of Women, Inc. v. District of Columbia*, 121 U.S.App.D.C. 171, 348 F.2d 783 (1965); *Hebrew Home for the Aged v. District of Columbia*, 79 U.S. App.D.C. 64, 142 F.2d 573 (1944); *Combined Congregations of the District of Columbia v. Dent*, 78 U.S.App.D.C. 254, 140 F.2d 9 (1943).

Such strict construction of exemptions granted under the Unemployment Compensation Act is necessary to fulfill its statutory purpose which is "to protect employees against economic dependency caused by temporary unemployment and to reduce the necessity of relief or other welfare programs." *Von Stauffenberg v. District Unemployment Compensation Board*, D.C.App., 269 A.2d 110, 111 (1970), 148 U.S.App.D.C. 104, 107, 459 F.2d 1128, 1131 (1972).

Accordingly, we conclude that the trial court erred in construing Section 46-303(c)(4)(B) to permit appellee-employers to defer increase of contributions to the beginning of calendar year 1976 and the Board's construction of the statute requiring increases in the third and fourth quarters of calendar year 1975 was correct.

Reversed.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SECURITY STORAGE COMPANY OF WASHINGTON, INC., ET AL.	:	
Plaintiffs	:	
v.	:	Civil Action No.
DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION FUND	:	7542-75 J. McArdle
Defendants	:	

PRELIMINARY INJUNCTION ORDER

This cause came on to be heard on Plaintiffs' Motion for Preliminary Injunction; and upon consideration thereof, the pleadings and affidavit filed herein, the stipulations of fact and argument of counsel; and after hearing in open court, the Court makes the following findings of fact, and conclusions of law and issues the following Order:

FINDINGS OF FACT

1. (a) Plaintiff Security Storage Company of Washington, D. C. is a cor-

poration organized under the laws of Delaware having its principal place of business in the District of Columbia. It employs approximately 125 employees in the District of Columbia and its DUCB rate of contribution, previously determined, for calendar year 1974 was 0.1%. On July 29, 1975 (sic), plaintiff Security Storage Company received a notice from the defendants raising its tax rate for the third and fourth quarters of 1975 (sic) from 0.1% to 0.7%. Its DUCB rate for the calendar year 1975 was 1.5% and on July 29, 1975, plaintiff Security Storage Company received a notice from the defendant raising its tax rate for the third and fourth quarters of 1975 from 1.5% to 2.7%.

(b) Plaintiff Security Travel Ltd., is a corporation organized under the laws of the District of Columbia and it employes six employees in the District of Columbia. On July 29, 1974, plaintiff

Security Travel Ltd., received a notice raising its unemployment compensation tax from 0.1% to 0.7%. On July 29, 1975, plaintiff Security Travel Ltd. received a notice raising its unemployment compensation tax from 0.1% to 2.5%.

(c) Plaintiff Federal Storage and Forwarding Company of Washington is a corporation organized under the laws of the District of Columbia and it employs four employees. On July 29, 1974, plaintiff Federal Storage and Forwarding Company received a notice raising its unemployment compensation tax from 0.1% to 0.7%. On July 29, 1975, plaintiff Federal Storage and Forwarding Company received a notice raising its unemployment compensation tax from 0.1% to 2.5%.

2. The plaintiffs are employers of employees in the District of Columbia who, under the terms of Title 46 Chapter 3 of

the D.C. Code, are required to pay into the Fund maintained by the defendant Board whose rate, previously determined prior to April 1, 1974 for calendar year 1974, was respectively 0.1%, 0.5%, 1.0%, 1.5% or 2.0% and whose rate, determined prior to April 1, 1975 for calendar year 1975, was respectively 0.1%, 0.5%, 1.0%, 1.5% or 2.0%.

3. The defendant, District Unemployment Compensation Board, a body corporate, is an independent board of the District of Columbia, created by D.C. Code §46-315 [herein the "Board"].

4. D.C. Code §46-302 creates the District Unemployment Trust Fund [herein "the Fund"] and all taxes or moneys required to be paid by employers are paid into the Trust Fund and all benefits are paid from the Fund. The Fund is deposited with the United States Treasury to be

held in trust for the District of Columbia.

5. D.C. Code §46-303(c)(3) provides an incentive to employers to provide jobs in the District of Columbia, to continue employees in their employ and not to terminate employees. D.C. Code §46-303(c)(8)(D) also solicits employers to make voluntary additional contributions to their separate accounts in the Fund to secure the benefits of a lower separate and individual contribution rate for their separate and individual accounts.

6. The contribution rate for the members of the class, if they maintain the proper reserves or pay in the proper amount of voluntary additional contributions are as follows:

Reserves	Contribution Rate
more than 3%	0.1%
more than 2.5% but less than 3%	1.5%
more than 1.5% but less than 2.5%	1.0%
more than 1.0% but less than 1.5%	1.5%
more than 0.5% but less than 1.0%	2.0%

7. For those who maintain reserves of less than 0.5% or are employers less than three years, the contribution rate is 2.7%.

8. For those new employers after December 31, 1971, not yet subject to D.C. Code §46-303(c)(4), the contribution rate is 1.3%.

9. By D.C. Code §46-303(c)(8), the plaintiffs were, prior to April 1, 1974, all determined to have contribution rates for unemployment compensation in the District of Columbia for calendar year 1975 (sic) of less than 2.7%; specifically either contribution rates of exactly: 0.1%, 0.5%, 1.0%, 1.5% or 2.0%. None of the plaintiffs appealed these determinations to the Board within 30 days.

10. On or about August 1, 1974, plaintiffs received notice that the contribution rate for employers was increased

for the third and fourth quarters of the calendar year, by 0.6%, but the total contribution rate not to exceed 2.7%.

11. The rate of contribution for the plaintiffs for third and fourth quarters of 1974 was raised by 0.6% as follows:

Existing Rate	New Rate
0.1	0.7
0.5	1.1
1.0	1.6
1.5	2.1
2.0	2.6

12. The 0.6% across-the-board increase applied by the Board resulted in rate increases as follows:

Existing Rate	New Rate	Percentage Increase
0.1	0.7	600%
0.5	1.1	120%
1.0	1.6	60%
1.5	2.1	40%
2.0	2.6	30%

13. By D.C. Code §46-303(c)(8), the plaintiffs were, prior to April 1, 1975, all determined to have contribution rates

for unemployment compensation in the District of Columbia for calendar year 1975 of less than 2.7%; specifically either contribution rates of exactly: 0.1%, 0.5%, 1.0%, 1.5% or 2.0%. None of the plaintiffs appealed these determinations to the Board within 30 days.

14. On or about August 1, 1975 plaintiffs received notice that the contribution rate would be increased for the third and fourth quarters of calendar year 1975 by 2.4% but the total contribution rate not to be more than 2.7%.

15. The rate of contribution for the plaintiffs for the third and fourth quarters of 1975 was raised by 2.4% as follows:

Existing Rate	New Rate
0.1	2.5
0.5	2.7
1.0	2.7
1.5	2.7
2.0	2.7

16. The 2.4% across-the-board increase applied by the Board results in increases as follows:

Existing Rate	New Rate	Percentage Increases
0.1	2.5	2400%
0.5	2.7	440%
1.0	2.7	170%
1.5	2.7	80%
2.0	2.7	35%

17. By contrast, non-members of the class were raised as follows:

Existing Rate	New Rate	Percentage Increases
2.7	2.7	0%

18. The following data is for three of the plaintiffs' contributions:

Security Storage

Quarter	Date	Contribution Rate	Taxable Wages	Contribution Paid	% Increase
1st	3/31/74	.1%	232,442.24	21.31	
2nd	6/30/74	.1%	239,689.57	143.41	
3rd	9/30/74	.7%	257,813.02	361.90	600%
4th	12/31/74	.7%	263,798.43	179.39	600%
1st	3/31/75	1.0%	243,783.16	2,157.45	
2nd	6/30/75	1.5%	240,639.80	1,877.77	
3rd	9/30/75	2.7%		1,395.90	80%
4th	12/31/75	2.7%		691.93	80%

Federal Storage and Forwarding Company

Quarter	Date	Contribution Rate	Taxable Wages	Contribution Paid	% Increase
1st	3/31/74	0.1%	11,448.41	11.45	
2nd	6/30/74	0.1%	8,809.71	7.85	
3rd	9/30/74	0.7%	8,886.85	17.16	700%
4th	12/31/74	0.7%	8,705.93	11.46	700%
1st	3/31/75	0.1%	8,656.10	8.66	
2nd	6/30/75	0.1%	8,707.93	7.48	
3rd	9/30/75	2.5%		(Est. 61.28)	2400%
4th	12/31/75	2.5%		(Est. 40.92)	2400%

Security Travel, Inc.

Quarter	Date	Contribution Rate	Taxable Wages	Contribution Paid	% Increase
1st	3/31/74	0.1%	13,465.08	13.42	
2nd	6/30/74	0.1%	15,737.00	9.24	
3rd	9/30/74	0.7%	14,998.90	17.01	600%
4th	12/31/74	0.7%	23,383.95	13.73	600%
1st	3/31/74	0.1%	15,995.04	15.45	
2nd	6/30/75	0.1%	16,192.72	7.63	
3rd	9/30/75	2.5%		(Est. 60.80)	.2400%
4th	12/31/75	2.5%		(Est. 49.02)	2400%

19. There are approximately 15,000 employers in the District of Columbia that are effected by the contribution rate increase.

20. That for the period of July through December 1974 the 0.6% increase of the employer's contribution in 1974 resulted in an estimated net increase of $2,191,500.00 for the Fund.

21. That for the period of July through December 1975 the 2.4% increase of the employer's contribution rate will result in an estimated net increase of $3,350,000.00 for the Fund.

22. It is estimated that the Unemployment Fund will be exhausted by February, 1976 and thereby causing the DUCB to borrow money from the U. S. Government.

23. Defendant asserts that it determined on July 21, 1975 that the

Fund as of June 30, 1975 was 1.6% of the taxable payroll for the calendar year ending December 1974.

24. Defendant is about to impose an increase in the rate of contribution to the DUCB Fund by employers in the District of Columbia, plaintiffs, for the third and fourth quarters of 1975 at a rate greater than that previously determined for the plaintiffs before April 1, 1975 and not in accordance with D.C. Code §46-303(c)(4)(B), §46-301(8)(C)(i) and DUCB Regulation No. 205-7.5 and will do so before September 30, 1975 for the third quarter of 1975 and before December 30, 1975 for the fourth quarter of 1975 unless restrained.

25. Immediate and irreparable injury, loss and damage will result to plaintiffs.

26. A preliminary injunction would

be in the public interest.

27. The inconvenience to the defendant does not outweigh the possible harm to plaintiffs.

28. There is no immediate prospect of harm to defendant.

29. Any administrative remedy yet available is inadequate and so limited as not to afford full and complete relief to plaintiffs.

CONCLUSIONS OF LAW

1. The Plaintiffs will likely prevail on the merits of their complaint.

2. D.C. Code §46-303(c)(8) authorizes the Defendant to fix rates of unemployment taxes for plaintiffs for calendar year 1976 based upon their individual reserves as of June 30, 1975, the "computation date".

3. D.C. Code §46-303(c)(4)(B) authorizes the Defendant, under certain

circumstances, to increase the contribution rate for each plaintiff based upon those certain conditions which may exist as of June 30, 1975, the "computation date". However, such increase in the rate of contribution must take effect and be applied in the ensuing calendar year, in this case, calendar year 1976. The Court concludes that D.C. Code §46-303(c)(4)(B), §46-301(8)(c)(i) and DUCB Regulation No. 205.7 require this result.

4. The defendant had asserted that it had the right to increase the rate of contribution based upon the June 30, 1975 ("computation date") conditions for the third and fourth quarters of 1975, and proposed to increase rates of contribution to the plaintiffs. The Court concludes that this construction is erroneous, based upon D.C. Code §46-303(c)(4)-

(B), §46-301(8)(C)(i) and DUCB Regulation No. 205.7.

5. The Plaintiffs have no adequate remedy at law. Any administrative remedy yet available is inadequate and so limited as not to afford full and complete relief to plaintiffs.

6. Immediate and irreparable injury, loss and damage will result to plaintiffs unless defendant is restrained.

7. A preliminary injunction would be in the public interest.

8. The inconvenience to the defendant does not outweigh the possible harm to plaintiffs.

9. There is no immediate prospect of harm to defendant.

10. A preliminary injunction is necessary to restrain defendant to avoid irreparable loss, injury and damage to plaintiffs pending trial of the case.

It is by the Court this 29th day of September, 1975

ORDERED, that defendant, their agents, servants, employees, attorneys and all persons in active concert or participation with them are hereby restrained from increasing the rate of contribution to plaintiffs for the third and fourth quarters of 1975 above that rate of contribution already previously determined for plaintiffs (prior to April 1, 1975) for 1975 and the defendant is

ORDERED, properly to impose the rate of contribution previously (prior to April 1, 1975) fixed for 1975 for the plaintiffs; provided that plaintiffs first give security in the sum of One Hundred Dollars ($100.00) in the form and manner required by law; and it is further

ORDERED, that this Preliminary Injunction Order remain in effect from

2:10 P.M., September 30, 1975 until final determination of this action or until further order of this Court.

/s/ Paul F. McArdle
JUDGE

Date: Sept. 30, 1975

Time: 2:10 P.M.

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED JAN 11 1977

ALEXANDER L. STEVAS

Clerk

NO. 10114 January Term, 1977

DISTRICT UNEMPLOYMENT
COMPENSATION BOARD,

Appellant,

v. CA 7542-75

SECURITY STORAGE
COMPANY OF WASHINGTON,
A Corporation, et al.,

Appellees.

BEFORE: Newman, Chief Judge, Kelly, Fickling, Kern, Gallagher, Nebeker, Yeagley, Harris and Mack, Associate Judges

O R D E R

On consideration of appellees' "petition for rehearing or hearing en banc or alternatively to clarify the court's order", it is

ORDERED that appellees' aforesaid petition is denied.

PER CURIAM

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1401

SECURITY STORAGE COMPANY OF WASHINGTON,
a Corporation, et al.,

Petitioners

V.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Russell L. Carter
Bill L. Smith
Robert J. Hallock
Earl S. Vass, Jr.
Attorneys for Respondent
District Unemployment
Compensation Board
Employment Security Building
6th & Pennsylvania Ave., N.W.
Washington, D.C. 20001

INDEX

TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

SECURITY STORAGE COMPANY OF WASHINGTON,
a Corporation, et al.,

Petitioners

V.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD,

Respondent

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

COUNTER-STATEMENT OF THE CASE

In the spring of 1974 a large increase in the number of unemployed persons in the District of Columbia making claims for unemployment compensation caused the District's Unemployment Compensation Fund to drop at a rapid rate. Pursuant to the statute, on June 30th of that year the Unemployment Compensation Board

computed the status of the fund and found it to be below 4 per centum of the total payrolls subject to the Act.

Following the requirements of the Statute the Board notified each employer that the tax rate would be raised by 1.5 per centum. Each employer was given notice and an opportunity to contest the rate raise. No employer contested the raise.

During the year 1975 the unemployment compensation claims continued to increase and on June 30th of that year the Board found the fund to be so low as to cause the rate of all employers to be raised to the statutory maximum of 2.7 per centum for the third and fourth quarters of that year. Again, each individual employer was given the opportunity to contest the rate raise. The petitioners herein noted an appeal to the rate raise and an administrative hearing was held. A decision by the Rate Review Committee holding the raise to be proper was not appealed.

In August 1975 the Petitioners filed a complaint seeking injunctive relief and a declaratory judgment as to the propriety of the rate raises. Subsequently the Petitioners amended the pleadings so as to seek refunds for the year 1974. A temporary restraining order was granted the Petitioners and on September 30, 1975 a preliminary injunction order was granted; this was appealed to the Court of Appeals. On October 21, 1976 the Court of Appeals entered a decision holding the Board's action in raising the tax rate to be in accord with the statute. Petitioners filed a Petition for a rehearing or a Hearing En Banc which was denied. This Petition for a Writ of Certiorari followed.

ARGUMENT

A. Neither the Court of Appeals nor the trial court denied Petitioners due process of law.

Petitioners contend that it has been afford-

ed no hearing on its alleged constitutional arguments. Respondent submits first that Petitioners' two main arguments in the trial court were:

1. Statutory construction, and
2. D.C. Administrative Procedure Act.

The 'due process' argument was barely alleged in the original complaint and was not expanded upon thereafter. The trial court's preliminary injunction ruling was based entirely upon the statutory construction argument. In a subsequent hearing, on October 10, 1975, counsel for Petitioners stated:

> There are other issues in the case on which Your Honor can decide in our favor.

Judge McArdle responded:

> I have ruled in your favor, Mr. Hauhn. (sic) Let me say this. It may be I misled you, but if I thought the other issues were one that I would rule in favor of I would have ruled in favor of.

It is thus apparent that the trial court did consider Petitioners' other arguments but did not

agree with them. The mere fact that the court did not address the alternate arguments in its order does not mean that Petitioners were denied a hearing on those arguments.

Inasmuch as Petitioners did not raise the other arguments on appeal, but only after the Court of Appeals reversed, it is no wonder that the Court of Appeals addressed only the issue of statutory interpretation in its decision.

Respondent further contends that the Court of Appeals, in deciding the merits of the case, followed the example of the U.S.Court of Appeals in Delaware & Hudson v. United Transportation Union, 147 U.S. App.D.C. 142, 450 F.2d 603 (1971) and also this Court in Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579, 72 S.C. 863, 96 L.Ed. 1153 (1952) in which this court held that if a matter is ripe to be decided on its merits, the Court may do so even if the matter has reached only the preliminary stage. In the instant case, the matter was ripe for a deter-

mination on the merits. The heart of Petitioners' case was that the Board had incorrectly interpreted a tax statute and had thus illegally deprived it of its property. It therefore follows that a correct interpretation by the Board would not result in a deprivation of property. The legality of the statute itself was not in question. This Court had long ago approved Congress' power to tax employers under the Unemployment Compensation Acts. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). The Court of Appeals' decision that the Board correctly enforced the taxing provision thus ended the matter and disposed of Petitioners' due process claim.

B. Respondent did not violate the District of Columbia Administrative Procedure Act.

Respondent first submits that there was no violation of the D.C.Administrative Procedure Act. The statute under which the Board acted was a plain requirement set forth by the Congress.

When the unemployment fund reached a certain low level, the statute required that the rate of contribution for all employers be raised. The Board's only function, therefore, was to mechanically take a reading of the fund and then to notify employers of future rates. Petitioners did not dispute the Board's reading of the fund. Petitioners, however, did contend that the Board's action constituted an interpretation of the law, an action of "ruling-making" under the District of Columbia Administrative Procedure Act. Respondent submits that there was nothing to interpret. The statute was clear; a mechanical reading of the fund was taken and new rates were put into effect. The Board not only mailed individual notice of the new rates to each and every covered employer in the District of Columbia but also gave each employer the right to file an administrative appeal of the rate raise as required by D.C. Code 46-303 (c)(10). In 1974 when the emergency tax rate was first put into effect, no employers

requested the administrative rate review; in 1975 only Petitioners filed for an administrative hearing.

C. Even if the Board failed to follow the District of Columbia Administrative Procedure Act, Petitioner was not deprived of any constitutional right.

The District of Columbia Administrative Procedure Act, D.C.Code § 1-1505(a) states:

> "(a) The Commissioner and Council and each independent agency shall, prior to the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice. The publication or service required by this subsection of any notice shall be made not less than thirty days prior to the effective date of the proposed adoption, amendment or repeal, as the case may be, except as otherwise provided by the Commissioner or Council or the agency upon good cause found and published with the notice.

Title 1, Sec. 1502 of the same Act under the heading Definitions states:

. . . .

(6) the term "rule" means the whole or any part of any Commissioner's Council's, or agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization procedure, or practice requirements of the Commissioner, Council, or of any agency;

(7) the term "rulemaking" means Commissioner's, Council's or agency process for the formulation, amendment, or repeal of a rule.

This is in contrast to the Federal Administrative Procedure Act, which states (U.S.Code Title 5 § 553):

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
>
> (1) a statement of the time, place, and nature of public rule making preceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy or rules of agency, organization, procedures, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (emphasis added)

The immediate difference to be noticed between these statutes is that the Federal law does not require interpretative rules to be published in the Federal Register whereas the District of Columbia does require interpretive rules to be published in the District of Columbia Register. Assuming that the Board interpreted a statute and did not publish such interpretation in the District of Columbia Register, this violation could not deprive the Petitioners of a due process right; to hold otherwise would be to say that the Federal Administrative Procedure Act is unconstitutional as it does not require

the publication of interpretive rules. Courts have not only upheld the Federal Administrative Procedure Act on numerous occasions but have in fact held interpretive rules not to be binding on the Courts. American President Lines v. Federal Maritime Commission, 114 U.S.App. D.C. 418, 316 F.2d 419 (1963) It cannot be held that the failure to file a rule which does not even have a binding effect is a deprivation of a due process right.

The Board's action, if rule making at all, can be classified as only interpretive rule making. The Board has no rule making authority. No such authority was delegated to the Board by Congress. The statute under which the Board acted (D.C. Code, Title 46, § 3(c)(4)(B) was enacted by Congress. The action of the Board was not legislative rule making in any sense. See K. Davis Administrative Law Treatise (1960) Sections 5.03 and 5.04.

Petitioners argue that because the Board did not follow the statute that it has been

deprived of a constitutional right. This is not the law. A statute may require a more stringent standard than that necessary to meet the requirements of the Fifth or the Fourteenth Amendments due process clauses. However, a failure to meet the more stringent requirement of the statute does not give rise to a violation of a constitutional right. Washington v. Davis 426 U.S. 229, 96 S.Ct. 2040 (1976) A violation of a constitutional right may in fact also be a violation of the Administrative Procedure Act but a violation of an Administrative Procedure Act is not in and of itself a violation of the Constitution.

CONCLUSION

The decision of the D.C. Court of Appeals which the Petitioners seek to have this Court review is correct. There is no violation of any due process right of the Petitioners. A violation of the District Administrative Procedure Act, if in fact a violation occurred,

is not, in this instance, a violation of a constitutional right.

Respectfully submitted,

Bill L. Smith

Bill L. Smith

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the District of Columbia Court of Appeals have been mailed, postage prepaid, to Gilbert Hahn, Jr., Esq. 11th Floor, 1150 Connecticut Avenue, N.W., Washington, D.C. 20036, Attorney for Petitioners

Bill L. Smith

Bill L. Smith

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1401

SECURITY STORAGE COMPANY OF WASHINGTON, a Corporation, et al., *Petitioners,*

v.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD, *Respondent.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF PETITIONERS IN REPLY

GILBERT HAHN, JR., ESQ.
11th Floor
1150 Connecticut Ave., N.W.
Washington, D. C. 20036
Attorney for Petitioners

MARY KATHLEEN HITE
WOLF, BLOCK, SCHORR,
and SOLIS-COHEN
1150 Connecticut Ave., N.W.
Washington, D. C. 20036
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

I N D E X

TABLE OF CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1401

SECURITY STORAGE COMPANY OF WASHINGTON,
A Corporation, et al.,

Petitioners

v.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF PETITIONERS IN REPLY

COUNTER-STATEMENT OF THE CASE

No temporary restraining order was entered.

COUNTER-ARGUMENT

A. Neither the trial court nor the Court of Appeals afforded a "meaningful" hearing to petitioners' claim that respondent promulgated a rule without complying with the D.C. APA.

Respondent contends that the trial court afforded petitioners a "hearing" on their allegations of D.C. APA violations. This contention is without basis. The order granting the preliminary injunction was clearly based on statutory construction. (Cert. Pet. 13a-26a)

The trial court expressly told the parties in a letter dated September 25, 1975 that "This ruling was made without any regard to the District of Columbia Administrative Procedure Act." (Pet. Reply, Appendix 1a). Respondent contends that the petitioner did not raise the invalid rule-making

argument in the Court of Appeals. This is incorrect.

The Court of Appeals heard only the statutory construction issue because Respondent, the Appellant below, raised only that issue in its appeal. Petitioners, the Appellees below, could only address themselves to the limited issue of statutory construction and the appropriateness of the granting of the preliminary injunction because that was the posture of the interlocutory appeal. Petitioners' basic problem arises from the fact that the Court of Appeals decided an issue that petitioners had no opportunity to argue.

Petitioners did raise the issue of a denial of a hearing on the allegations of illegal rule-making in their petition for reconsideration after the Court of Appeals had reversed on the merits. The Court of Appeals, however, denied petitioners' re-

quest for a rehearing, thereby depriving petitioners of their constitutional right to have their allegations of unconstitutional and illegal rule-making heard.

Since no hearing has been afforded petitioners on their allegations of D.C. APA violations, respondent's contention that it did not violate the D.C. APA is inappropriate. The issue must be determined in a judicial hearing, to which petitioners have a constitutional right.

It is sufficient to state here that petitioners' allegations are not frivolous. Petitioners stated in their petition for reconsideration that the respondent engaged in rule-making by determining how and when §46-303c was to be implemented. The differing opinions of the trial court and the Court of Appeals reveal that the statute was not amendable to a "mechanical reading".

Respondent had to interpret the statute in order to implement it.

It is that interpretation which petitioners allege to be violative of the D.C. APA and which was allegedly thereafter applied to deprive petitioners of property without due process.

B. The Court of Appeals deprived petitioners of their due process right to a hearing on the issue of whether the District Unemployment Compensation Board violated the District of Columbia Administrative Procedure Act.

1. Petitioners have a right under the due process clause of the fifth amendment to a hearing on their allegation that they were deprived of property by unauthorized administrative action in violation of due process of law.

Respondent confuses the issue in this case by arguing that a violation

of the District of Columbia Administrative Procedure Act (hereinafter D.C. APA) would not injure petitioners' constitutional rights. Petitioners do contend that their allegations, if proved, would establish an unconstitutional deprivation of property by unauthorized administrative action.

Respondent's brief argues that a citizen has no constitutional right to a hearing where an administrative body has confiscated his property without following statutorily mandated procedures. The respondent's position is inconsistent with the decisions of this Court.

Goldberg v. Kelly, 397 U.S. 254 (1970) and the line of cases which followed it established the constitutional rule that no person may be deprived of

a statutory entitlement without at least minimal procedural safeguards. In cases involving violations of the Federal Administrative Procedure Act, the Court has carefully scrutinized administrative actions and has required strict adherence to administrative procedures. Morton v. Ruiz, 415 U.S. 199 (1974); N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969). The Court's approach to these cases is a logical extension of the Goldberg rationale; judicial scrutiny is intended to ensure administrative compliance with the minimal procedural safeguards which the legislature has deemed essential to the protection of liberty and property interests.

Thus, the due process clause necessarily protects petitioners'

right to have their allegations heard in court, for the opportunity to be heard "works by itself to protect against arbitrary deprivations of property." Fuentes v. Shevins, 407 U.S. 67, at 81 (1972). In the absence of this due process protection, government agencies would be free arbitrarily to confiscate property without fear of judicial reprimand.

Any distinctions between the Federal Administrative Procedure Act and the D.C. APA in no way diminish petitioners' constitutional right to be heard. The District of Columbia, having established its own administrative procedures, must abide by them. If it does not, the District's citizens have a due process right to contest the District's illegal confiscation of property in court. District of Colum-

bia v. Green, 310 A.2d 848 (D.C.App., 1973).

2. Petitioners' right to be heard is essentially compelling because its allegations, if proved, would establish an unconstitutional deprivation of property without due process of law.

Petitioners have a constitutional right to be heard regardless of the constitutional significance of their allegations below. In this case, however, petitioners' right to hearing is especially compelling because respondent has allegedly deprived petitioners of a statutory entitlement without following statutory procedure. Such an unauthorized confiscation of a property interest is inconsistent with the due process clause.

This Court has emphasized the importance of a hearing in cases where

constitutional claims are made. Reynolds v. Cochran, 365 U.S. 526 (1961). Petitioners have shown the constitutional significance of their allegation in their petition for certiorari and are entitled to this Court's special consideration.

Respondent relies on Washington v. Davis, 426 U.S. 279 (1976) to rebut the constitutional nature of petitioners' claim. Davis, however, involved the constitutional and statutory validity of a procedural rule. Petitioners in the case at bar have accepted the validity of the D.C. APA and have alleged that respondent engaged in invalid rule-making in violation of the APA. Respondent's invalid rule was thereafter applied to deprive petitioners of their statutory entitlement.

Respondent was constitutionally bound to follow the D.C. APA. Any contrary argument would strip the due process clause of its vitality by, in effect, authorizing the state to seize property in disobedience of its own laws.

Petitioners' right to be heard is thus based on the due process clause and is emphasized by the constitutional basis of its claims.

CONCLUSION

The Court of Appeals deprived petitioners of their due process right to a hearing on substantial issues of constitutional significance. This Court is respectfully urged to issue a writ of certiorari.

Respectfully submitted,

Gilbert Hahn, Jr., Esq.
Wolf, Block, Schorr and Solis-Cohen
11th Floor
1150 Connecticut Ave., N.W.
Washington, D. C. 20036
Attorneys for Petitioners

APPENDIX

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Washington, D.C. 20001

Paul F. McArdle
Judge

September 25, 1975

Gilbert Hahn, Jr., Esquire
700 Colorado Building
Washington, D. C. 20005

Bill L. Smith, Esquire
District Unemployment
Compensation Board
6th & Pennsylvania
Avenue, N. W.
Washington, D. C. 20001

Re: Security Storage Co. v. D.C.U.C.B., CA 7542-75

Gentlemen:

This is to advise that after reviewing the entire file and having heard your oral argument this morning, I am preparing to grant the plaintiff's Motion for Preliminary Injunction based on the statutory authority under D.C. Code §46-303(c)(4)(B), § 46-301(8)(C)(i) and the District of Columbia Unemployment Compensation Board Regulation No. 205.7. This ruling was made without any regard to the District of Columbia Administrative Procedure Act.

For the reasons set forth above, the plaintiff will please prepare proposed findings of fact and conclusions of law.

Very truly yours,

/s/ Paul F. McArdle
Paul F. McArdle

nje